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No. 08-441

In the Supreme Court of the United States

JACK GROSS, PETITIONER

v.

FBL FINANCIAL GROUP, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a discrimination case under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq*.

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INTEREST OF THE UNITED STATES

This case concerns the appropriate evidentiary standard necessary to trigger mixed-motive jury instructions in cases of intentional discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq*. The Equal Employment Opportunity Commission (EEOC) has primary responsibility for interpreting and enforcing the ADEA, which prohibits discrimination in employment on the basis of age. The Department of Justice has a significant interest in the interpretation and enforcement of a wide range of federal civil rights statutes, including the ADEA.

STATEMENT

1. Petitioner was born in June, 1948. In 1971, he began working as a claims adjuster for respondent's Iowa Farm Bureau division, handling a wide variety of insurance claims for three counties in Iowa. He left his employment with respondent in 1978, and then returned in 1987, again working at the Iowa Farm Bureau division. Petitioner thereafter received regular promotions. In 1990, petitioner was made division claims manager, supervising eight to nine claims adjusters and a clerical staff. Three years later, in 1993, petitioner was promoted to be regional coordinator and training director. In 1994, petitioner became director of claims administration and had several units reporting to him. Petitioner was promoted again in 1997, when he was made assistant claims manager, and then again in January 1999, when he was made claims administration vice president. Pet. App. 2a, 19a-20a.

Throughout petitioner's tenure with respondent, he was supervised by Tom Eppenauer. Pet App. 19a-20a. Eppenauer consistently gave petitioner high scores on his evaluations. *Id.* at 20a. Eppenauer himself had received several promotions but, in August 2000, he was demoted and no longer had supervisory authority over petitioner. *Id.* at 20a-21a. Eppenauer eventually retired. *Id.* at 21a.

In January 2001, Eppenauer's replacement—Andy Lifland—changed petitioner's job title to claims administration director as part of a department-wide reorganization. While petitioner's job responsibilities remained the same, petitioner viewed the change as a demotion because he received fewer points in the company's salary grade system. Petitioner began to receive lower scores on his job performance evaluations. Two years later, in January 2003, the Iowa Farm Bureau division merged with the Kansas and Nebraska Farm Bureau divisions. Pet. App. 21a. After the

merger, Lifland decided to move petitioner to the position of claims project coordinator, which petitioner viewed as a demotion. *Id.* at 22a-23a. Most of his former duties went to the newly-created position of claims administration manager, which was filled by Lisa Kneeskern. Kneeskern, who was in her early forties, had previously been supervised by petitioner. Petitioner was 54 years old at the time. *Id.* at 23a.

2. Petitioner filed suit under the ADEA, alleging that his 2003 reassignment to a less desirable position amounted to age-based discrimination. Pet. App. 3a. At trial, petitioner introduced evidence that he was highly qualified for the claims administrator manager position, and that Kneeskern was either far less qualified or, as Eppenauer testified, "not qualified" for the position. *Id.* at 26a. Eppenauer also testified at trial that Kneeskern's experience in claims administration was extremely limited because she had never worked in field adjusting, bodily injury claims, total loss automobile claims, workers' compensation, and several other claims areas. *Ibid.* He also testified that petitioner, by contrast, had "superb knowledge" about every area in the department. *Id.* at 27a.

Respondent claimed that it assigned petitioner to the claims project coordinator position because it felt that was the best fit for his strengths, but petitioner produced evidence that the explanation was false and a pretext for discrimination. Pet. App. 23a, 28a. The evidence adduced at trial indicated that the position was, in fact, ill-defined and lacked any specific job duties. *Id.* at 28a. Moreover, inconsistencies and contradictions in Lifland's testimony undermined his credibility. *Id.* at 29a-30a.

Petitioner produced additional evidence suggesting the reassignment was age-based. There was evidence that, following the reorganization, "everybody over 50 [from the

Kansas Farm Bureau division] got bought out." Pet. App. 25a (citation omitted). As for respondent's older employees in Iowa, petitioner testified that the successful, well-paid older employees "were all pretty much taken down at the same time." *Ibid.* Eppenauer likewise testified that a number of senior employees with significant experience "were isolated and demoted." *Id.* at 30a-31a.

At the close of trial, the district court instructed the jury that it should return a verdict for petitioner if it "[has] been proved by the preponderance of the evidence * * * [that] plaintiff's age was a motivating factor" in respondent's decision to demote him. J.A. 9-10. The district court further instructed the jury that it should return a verdict for respondent "if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." J.A. 10. The district court further told the jury that it may find that "age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination." *Ibid.* The court, in a separate instruction to the jury, explained that petitioner's age was "a 'motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." *Ibid.* The jury found in favor of petitioner and awarded him $46,945 in lost compensation. Pet. App. 3a.

The district court denied respondent's motion for judgment as a matter of law or for a new trial. Pet. App. 15a-48a. The district court held that even though there was no "direct evidence of discrimination," there was "ample circumstantial evidence * * * that [respondent] intentionally discriminated against [petitioner] based on his age." *Id.* at 25a. In particular, the court pointed to evidence that peti-

tioner "was far more experienced and qualified than Kneeskern for the claims administration manager position," *ibid.*; that petitioner "was never even provided an opportunity to apply for the claims administration manager position," *id.* 27a; that other older employees were demoted after the 2003 merger, *id.* at 30a-31a; and that the stated reason for demoting petitioner—namely, that his new position was "a good fit for his strengths and weaknesses"—"was not credible because there was no defined position for [petitioner] to 'fit' into." *Id.* at 28a.

3. The court of appeals reversed and remanded the case for a new trial. Pet. App. 1a-14a. The court held that the district court improperly instructed the jury that "if [petitioner] proved by any evidence—direct or otherwise—that age was 'a motivating factor' in the employment decision, then the burden shifted to [respondent] to prove that its decision would have been the same absent consideration of [petitioner]'s age." *Id.* at 6a-7a. After observing that it has applied several of this Court's decisions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to claims under the ADEA, Pet. App. 4a, the court of appeals held that the district court's instruction permitting the burden to shift to the defendant was only permissible in a mixed-motive case, *i.e.*, "where an employer is motivated by both permissible and impermissible considerations," *id.* at 5a.

In the court of appeals' view, Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse* v. *Hopkin*s, 490 U.S. 228 (1989), required the plaintiff in a Title VII case, in order to obtain a mixed-motive instruction, to "show 'by direct evidence that an illegitimate factor played a substantial role' in the employment decision." Pet. App. 5a (quoting *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring in the judgment)). The court of appeals fur-

ther held that if a plaintiff "fails to present 'direct evidence' that an illegitimate criterion played a 'substantial role' in the employment decision," then the burden of persuasion should remain at all times with the plaintiff under the framework for single-motive cases under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 6a.

The court of appeals rejected petitioner's argument that 42 U.S.C. 2000e-2(m), enacted as part of the Civil Rights Act of 1991 amending Title VII, and the Supreme Court's decision construing that amendment in *Desert Palace, Inc.*, v. *Costa*, 539 U.S. 90 (2003) (*Desert Palace*), eliminated any requirement under the ADEA that the plaintiff introduce direct evidence of discrimination. The court, although recognizing that *Desert Palace* held that 42 U.S.C. 2000e-2(m) does not contain a direct evidence requirement, explained that *Desert Palace* based its decision on the language of Section 2000e-2(m), and that provision by its own terms applied to claims under Title VII, not under the ADEA. Pet. App. 9a-12a. The court of appeals thus concluded that "[e]ven if some of the analysis in *Desert Palace* may seem inconsistent with the controlling ruling from *Price Waterhouse*, the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable." *Id.* at 11a. Because the court held that the jury was improperly instructed, the court did not address respondent's additional argument that the evidence was insufficient as a matter of law to find for the petitioner. *Id.* at 14a, 16a.

SUMMARY OF ARGUMENT

The court of appeals erred in requiring that a plaintiff under the ADEA must present direct evidence of discrimination.

A. The text of the ADEA prohibits an employer from discriminating against any individual "*because of* such individual's age." 29 U.S.C. 623(a)(1) (emphasis added). The statute's "because of" language sets out a causation requirement that applies to claims in which age motivated a challenged employment decision, even though other, legitimate factors also may have motivated the decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (interpreting identical "because of" language in Title VII). Nothing in the text of the ADEA indicates that Congress intended to limit proof of causation to direct evidence. Given the complete absence of anything in the statutory language requiring direct evidence of causation, the court of appeals erred in holding that the ADEA imposes a direct evidence requirement.

This Court's unanimous decision in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003), strongly reinforces the conclusion that a plaintiff under the ADEA is not limited to direct evidence in proving discrimination based on age. *Desert Palace* construed language of Title VII, as amended by the Civil Rights Act of 1991, which provides that an unlawful unemployment practice is established when a plaintiff "demonstrates" that a prohibited factor such as race or sex was "a motivating factor for any employment practice." 42 U.S.C. 2000e-2(m). Because that language does not impose a requirement of a heightened showing through direct evidence, the Court rejected the notion that the statute departed from the conventional rule of civil litigation that permits a plaintiff to prove his case through direct or circumstantial evidence. *Desert Palace*, 539 U.S. at 98-100.

This Court's analysis in *Desert Palace* is fully applicable to the ADEA, which also lacks language imposing a direct evidence requirement. Indeed, *Desert Palace* cited an *ADEA* case, *Reeves* v. *Sanderson Plumbing Products, Inc.*,

530 U.S. 133 (2000), for the proposition that circumstantial evidence, like direct evidence, is probative of discrimination. 539 U.S. at 100. Thus, *Desert Palace* itself strongly suggests that circumstantial evidence may be used to show causation under the ADEA.

B. A direct evidence requirement would also conflict with the Court's treatment of similar evidentiary issues under the ADEA. In *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), this Court held that direct evidence is not required to establish a "willful" violation of the ADEA. This Court also has held more generally that the evidentiary issues arising under the ADEA should be treated consistent with general principles of evidence law.

Permitting the use of direct or circumstantial evidence to show causation is also consistent with the analysis of this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and subsequent decisions that address unlawful action that is motivated by both permissible and impermissible objectives. Those decisions recognize that a plaintiff may use circumstantial evidence to establish that an impermissible motive caused adverse action. Indeed, in *Arlington Heights*, this Court emphasized that the question whether discrimination was a motivating factor "demands a sensitive inquiry into such *circumstantial and direct* evidence of intent as may be available." *Id.* at 266 (emphasis added).

C. The court of appeals based its direct evidence requirement on Justice O'Connor's separate opinion concurring in the judgment in *Price Waterhouse*, in which she expressed her view that a plaintiff in a Title VII mixed-motive case must show by "direct evidence" that an illegitimate criterion was a substantial factor in the challenged

decision. 490 U.S. at 276. The Eighth Circuit held (Pet. App. 6a-12a) that her opinion was the controlling opinion of *Price Waterhouse* and that it set forth the governing rule to be applied under the ADEA. Only Justice O'Connor's opinion contains a direct evidence requirement and no other Justice in *Price Waterhouse* suggested that evidence in a Title VII mixed-motive case is limited to direct evidence. This Court, however, need not decide which opinions in *Price Waterhouse* represent the holding of the Court to decide the question presented here. Whatever effect Justice O'Connor's separate opinion had on the outcome in *Price Waterhouse*, this Court's subsequent and unanimous decision in *Desert Palace* establishes a general principle that absent statutory language requiring direct evidence, a plaintiff may prove his or her case by a preponderance of the evidence using direct or circumstantial evidence. It is that principle that governs this case.

Nor is a different outcome warranted because *Desert Palace* construed the 1991 Amendments to Title VII, not the "because of" language in the ADEA. This Court's analysis in *Desert Palace* cuts strongly against the imposition of a direct evidence requirement in the ADEA that is not supported by the statutory text. Moreover, there was no settled direct evidence rule that Congress could be deemed to have ratified with respect to the ADEA.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT DIRECT EVIDENCE OF AGE DISCRIMINATION IS NECESSARY UNDER THE ADEA

The ADEA makes it "unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of em-

ployment, *because of* such individual's age." 29 U.S.C. 623(a)(1) (emphasis added). Congress enacted the ADEA "as part of an ongoing congressional effort to eradicate discrimination in the workplace * * * nationwide." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (citing, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*). The ADEA's substantive, anti-discrimination provisions "are modeled upon the prohibitions of Title VII." *Ibid.*; see *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII").

This Court, in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), interpreted identical "because of" language in Title VII to encompass gender discrimination claims where the challenged decision is the product of both a legitimate and an illegitimate motive, unless the employer can prove "it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-245 (plurality opinion); see *id.* at 261 (White, J., concurring in the judgment) (no violation of Title VII where "employer credibly testifies that the action would have been taken for the legitimate reasons alone"); *ibid.* (O'Connor, J., concurring in the judgment) (no Title VII liability where employer can "demonstrate by a preponderance of the evidence that it would have reached the same decision * * * absent consideration of [the plaintiff's] gender"). In order to shift the burden to the employer to show that it would have taken the same action absent a sex-based motive, *Price Waterhouse* requires the plaintiff first to show that sex was a motivating or substantial factor in the employment decision.

Id. at 244 (plurality opinion); *id.* at 259 (White, J. concurring); *id.* at 265 (O'Connor, J., concurring).[1]

The lower courts to have considered the issue unanimously have agreed that the mixed-motive approach endorsed in *Price Waterhouse* applies to claims under the ADEA.[2] The question presented in this case is whether a plaintiff in a mixed-motive case under the ADEA can trigger the shifting of the burden to the defendant only with direct evidence of discrimination. The answer to that question is no, because such a requirement is absent from the statutory text and would be inconsistent with this Court's precedents.

Of course, permitting a plaintiff to use any *type* of evidence, including circumstantial evidence, to meet his burden in a mixed-motive case under the ADEA does not diminish what the plaintiff must prove: discrimination because of age. This Court has made clear that it is not suffi-

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[1] The three dissenting Justices in *Price Waterhouse* would have imposed on the plaintiff at all times the burden of showing causation under the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). *Price Waterhouse*, 490 U.S. at 279-295 (Kennedy, J., dissenting). For the reasons stated in this brief, there is no basis for a direct evidence requirement regardless of whether causation is established under the framework of *Price Waterhouse* or of *McDonnell Douglas* and *Burdine*.

[2] *Febres* v. *Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000); *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 180 (2d Cir. 1992); *Starceski* v. *Westinghouse Elec. Corp.*, 54 F.3d 1089, 1098 (3d Cir. 1995); *EEOC* v. *Warfield-Rohr Casket Co.*, 364 F.3d 160, 163-164 (4th Cir. 2004); *Rachid* v. *Jack In The Box, Inc.*, 376 F.3d 305, 310-311 (5th Cir. 2004); *Wexler* v. *White's Fine Furniture, Inc.*, 317 F.3d 564, 571-572 (6th Cir. 2003); *Visser* v. *Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); *Hutson* v. *McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir. 1995); *Lewis* v. *YMCA*, 208 F.3d 1303, 1304-1305 (11th Cir. 2000) (per curiam).

cient to show an employer acted because of a factor that is simply correlated with age. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 608-609, 611 (1993); see *id.* at 609 ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."). Nor is it sufficient to rely solely on "stray remarks" that suggest no more than "discrimination in the air." *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) (evidence shows "'discrimination brought to ground and visited upon' an employee"); cf. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (in same-sex harassment case under Title VII, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion] * * * because of * * * sex.*'") (emphasis added).[3]

A. A Direct Evidence Requirement Is Inconsistent With The Text Of The ADEA And This Court's Decision In *Desert Palace*

1. The starting point for any statutory construction analysis is the statutory text. *Desert Palace*, 539 U.S. at 98;

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[3] If the evidence produced at trial is too weak to support an inference that the employer was motivated by age, then the district court should not instruct the jury at all, but should instead grant judgment as a matter of law to the employer. Fed. R. Civ. P. 50(a). In this case, however, the trial court found that there was "ample circumstantial evidence * * * that [respondent] intentionally discriminated against Gross based on his age." Pet. App. 25a. Because the court of appeals held that the jury improperly was permitted to consider circumstantial evidence of respondent's discriminatory intent, the court of appeals reversed the jury's verdict without considering whether the evidence presented to the jury was sufficient to sustain the jury's verdict. *Id.* at 14a; see *id.* at 16a.

Robinson v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992); see *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 602-603 (2004) (Thomas, J., dissenting) (analyzing "plain language" of ADEA, 29 U.S.C. 623(a)(1)). If "the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace*, 539 U.S. at 98 (quoting *Germain*, 503 U.S. at 254).

To recover under the ADEA a plaintiff must show that he was discriminated against "*because of* such individual's age." 29 U.S.C. 623(a)(1) (emphasis added). This Court's precedents accordingly make clear that a plaintiff must show that an adverse employment action was actually caused by an age-based motive. *Hazen Paper Co.*, 507 U.S. at 610 ("[L]iability depends on whether * * * age[] actually motivated the employer's decision" and "had a determinative influence on the outcome."); accord *Kentucky Ret. Sys.* v. *EEOC*, 128 S. Ct. 2361, 2366 (2008); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000). A causation requirement, however, does not mean that the plaintiff is limited in the type of evidence that may be used to meet his burden. Like Title VII, the ADEA "[o]n its face * * * does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Desert Palace*, 539 U.S. at 98-99. The absence of any textual suggestion of a direct evidence requirement strongly indicates that Congress did not intend to require a plaintiff under the ADEA to show causation only through the use of direct evidence.

In *Desert Palace*, 539 U.S. at 98-101, this Court unanimously held that direct evidence was not required to meet the plaintiff's burden in a mixed-motive case under Title VII, as amended by the Civil Rights Act of 1991. The language of that amendment enables the plaintiff in a mixed-

motive case to establish liability by "demonstrat[ing]" that a prohibited factor "was a motivating factor for any employment practice." 42 U.S.C. 2000e-2(m). *Desert Palace*'s refusal to embrace a direct evidence requirement was grounded in two parts, each of which applies to the ADEA. First, the Court explained that Title VII's language "unambiguously" states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration, and, on its face, contains no requirement that a plaintiff make a heightened showing through direct evidence. *Desert Palace*, 539 U.S. at 98. The Court noted that the absence of any such language "is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances." *Id.* at 99. Second, the Court explained that Title VII's silence on the issue suggested that Congress intended courts to adhere to the "'[c]onventional rul[e] of civil litigation' * * * [that] requires a plaintiff to prove his case 'by a preponderance of the evidence,' * * * using 'direct or circumstantial evidence.'" *Ibid.* (quoting *Price Waterhouse*, 490 U.S. at 253 (plurality opinion), and *USPS Bd of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983)).

2. This Court's analysis in *Desert Palace* strongly supports the conclusion that the ADEA does not impose a direct evidence requirement. As in *Desert Palace*, nothing in the text of the ADEA imposes a heightened, direct evidence requirement. See, *e.g.*, 29 U.S.C. 623(a)(1) and (2) (employer cannot discriminate "because of * * * age"). Given the statutory silence on the issue, the "[c]onventional rul[e] of civil litigation" permits the "plaintiff to prove his case 'by a preponderance of the evidence,' * * * using 'direct or circumstantial evidence.'" *Desert Palace*, 539 U.S. at 99 (quoting *Price Waterhouse*, 490 U.S. at 253 (plurality opinion), and *Aikens*, 460 U.S. at 714 n.3).

Although the text of the 1991 amendment construed in *Desert Palace* differs from the "because of" language of the ADEA, there is no basis for judicially imposing a direct evidence requirement under the ADEA—a requirement that notably would be unique. See *Desert Palace*, 539 U.S. at 100 (observing that "neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute").

Quite to the contrary to what the decision below held, *Desert Palace* itself supports the conclusion that circumstantial evidence may be used to show discrimination under the ADEA. Thus, *Desert Palace* cited one of this Court's key ADEA decisions, *Reeves* v. *Sanderson Plumbing Products, Inc.*, *supra*, as an example in which the Court had "acknowledged the utility of *circumstantial* evidence in discrimination cases." *Desert Palace*, 539 U.S. at 99-100 (emphasis added). The Court explained that *Reeves* had recognized the principle "that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of *circumstantial evidence* that is probative of intentional discrimination.'" *Id.* at 100 (quoting *Reeves*, 530 U.S. at 147).

Moreover, the policy reasons this Court articulated in *Desert Palace* are fully applicable when a plaintiff is seeking to establish liability under the ADEA. "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace*, 539 U.S. at 100 (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)). For instance, the Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reason-

able doubt is required." *Ibid.* (citing *Holland* v. *United States*, 348 U.S. 121, 140 (1954)). The Court in *Desert Palace* thus observed that the adequacy of circumstantial evidence to establish liability is so thoroughly accepted that "juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'" *Ibid.* (quoting 1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions, Criminal* § 12.04, at 140 (5th ed. 2000)). Indeed, in this case, *respondent* proposed a jury instruction, ultimately given to the jury, that states in pertinent part:

> [S]ome of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

Resp. Proposed Jury Instructions (Preliminary Instruction No. 2) (Dist Ct. Docket No. 83); Preliminary Jury Instructions (Preliminary Instruction No. 2) (Dist. Ct. Docket No. 113).

B. A Direct Evidence Requirement Is Inconsistent With This Court's ADEA Precedents And Other Decisions That Recognize The Validity Of Circumstantial Evidence

1. The absence of a direct evidence requirement under the ADEA is further confirmed by this Court's prior decisions interpreting the ADEA, and by its rulings in other contexts in which mixed motives contributed to a challenged action. As discussed in *Desert Palace*, *Reeves* recognized that the evidence that may be relied upon to establish intentional discrimination is *any* evidence tending to show unlawful disparate treatment. This Court also has rejected a direct evidence requirement to show another element of liability under the ADEA. In *Hazen Paper Co.*, the Court

held that an award of liquidated damages for a "willful" violation of the ADEA (see 29 U.S.C. 626(b)) did *not* require a heightened evidentiary showing that the "underlying evidence of liability be direct rather than circumstantial." 507 U.S. at 615. The Court accordingly held that "the employee need not * * * provide direct evidence of the employer's motivation." *Id.* at 617. Because direct evidence is not required to establish an aggravated "willful" violation of the ADEA it would be exceedingly anomalous for the ADEA to compel a plaintiff to produce direct evidence of unlawful discrimination to carry his burden in an ordinary mixed-motive case.

Several decisions of this Court similarly have held that employment discrimination cases under the ADEA are generally no different from other types of civil litigation with respect to evidentiary issues. In *Reeves*, this Court stressed that "trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" 530 U.S. at 147 (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524 (1993)). For instance, in *Sprint/United Management Co.* v. *Mendelsohn*, 128 S. Ct. 1140 (2008), the Court held that generally applicable evidentiary rules should be applied to determine the admissibility of evidence of age discrimination by other supervisors. Likewise, in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002), the Court rejected the contention that an ADEA or Title VII complaint must contain greater "particularity" than other civil complaints. And in *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Court rejected a *per se* rule that a prima facie showing under the ADEA requires that the person to whom the plaintiff is compared in applying the *McDonnell Douglas* framework be under 40 years of age. This Court held rather that the plaintiff is required simply to adduce "*evidence adequate to create an inference*

that an employment decision was based on a[*n*] [*illegal*] *discriminatory criterion*." *Id.* at 312 (brackets in original) (quoting *International Bhd. of Teamsters* v. *United States*, 431 U.S. 325, 358 (1977)).

This Court's ADEA precedents thus have consistently rejected the imposition of special evidentiary rules or requirements that are not embodied in the text of the ADEA itself and that deviate from ordinary rules of civil litigation.

2. A direct evidence requirement would also conflict with this Court's precedents addressing mixed motives in other contexts. This Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—a decision on which Justice White's *Price Waterhouse* concurring opinion wholly relied, 490 U.S. at 258-260 (White, J., concurring in the judgment) and the plurality's opinion largely relied, *id.* at 248-249, 254—addressed the appropriate rule of causation in a First Amendment retaliation case. The Court set out a rule under which the plaintiff must first show that his constitutionally-protected conduct "was a 'substantial factor' or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." *Mt. Healthy*, 429 U.S. at 287 (citing *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-271 & n. 21 (1977)). The Court did not, however, restrict the plaintiff to any particular type of evidence in meeting his burden. The employer then had the burden of showing by a preponderance of the evidence that "it would have reached the same decision * * * even in the absence of the protected conduct." *Ibid.* The underlying rationale for its decision, the Court stated, was to place the employee in no better and no worse a position than if he had not engaged in the constitutionally protected conduct. *Id.* at 285-286; see *Board of County Comm'rs* v. *Umbehr*, 518

U.S. 668, 675 (1996) (First Amendment case applying *Mt. Healthy* burdens of proof).

On the same day it decided *Mt. Healthy*, the Court issued its decision in *Arlington Heights*, a case challenging a village's zoning decision as racially discriminatory under the Fourteenth Amendment. The Court rejected the notion that the plaintiff must prove that racial bias was the sole cause for a challenged action. 429 U.S. at 265. Rather, the Court made clear that the plaintiff must offer "proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-266. This Court also specifically acknowledged that adjudicating the issue of causation "demands a sensitive inquiry into such *circumstantial and direct* evidence of intent as may be available." *Id.* at 266 (emphasis added); see *id.* at 266-268 (discussing types of evidence that may assist inquiry, including circumstantial evidence).

This Court has extended the analysis of *Mt. Healthy* beyond cases based on the Constitution. In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), this Court upheld the approach of the National Labor Relations Board (NLRB) to mixed-motive cases—namely that the NLRB General Counsel bears "the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge," and the employer then may avoid liability by proving "that the employee would have lost his job in any event." *Id.* at 400. The Court held that the Board's allocation of proof was reasonable, for "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *Id.* at 403.

The Court ultimately upheld the Board's evidentiary finding that the employee's effort to establish a union was a motivating factor in his firing and that he "would not have been fired even if the employer had not had an anti-union animus." *Id.* at 404-405. Significantly, the evidentiary basis for that finding was not direct evidence; rather, as the Court explained, there was evidence that the decision-maker generally harbored an anti-union animus, and that the two proffered explanations for the discharge were not worthy of credence and were "clearly a pretext." *Id.* at 396-397, 404.

C. *Price Waterhouse* Does Not Require That This Court Impose A Direct Evidence Requirement Under The ADEA

1. In imposing a direct evidence requirement under the ADEA, the court of appeals relied on Justice O'Connor's separate opinion concurring in the judgment in *Price Waterhouse*. Pet. App. 5a-12a. Justice O'Connor's separate opinion was not joined by any other Justice, including the other five Justices who agreed with the general burden-shifting framework announced in that case for mixed-motive cases. See *Price Waterhouse*, 490 U.S. at 244-245 (plurality opinion); *id.* at 259 (White, J. concurring in the judgment).

This Court in *Price Waterhouse* construed the language under Title VII that proscribes discrimination "because of" a prohibited factor such as race or sex. 42 U.S.C. 2000e-2(a)(1). That language is, of course, identical to the prohibition in the ADEA. 29 U.S.C. 623(a)(1) (making it unlawful to "discriminate against any individual * * * because of such individual's age"). As discussed above, see p. 10, *supra*, *Price Waterhouse* was a fractured decision in which no opinion garnered a majority concerning the respective burdens in a mixed-motive case. Six Justices in

Price Waterhouse agreed, however, that once a plaintiff met his or her burden of proving that sex was a motivating or substantial factor in the employment decision, "an employer could 'avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play * * * a role.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 244 (plurality opinion)).[4] The Court disagreed, however, "over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense." *Ibid.*

The *Price Waterhouse* plurality, comprised of four Justices, would have held that a plaintiff must prove "that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258 (plurality opinion). "The plurality did not, however, 'suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 251-252).

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[4] As discussed in *Desert Palace*, Congress responded to the holding of *Price Waterhouse* by amending Title VII to include 42 U.S.C. 2000e-2(m), which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." The amended statute further provides that if an employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court may award the plaintiff declaratory relief, certain injunctive relief, and attorney's fees, but may not award damages or order reinstatement, hiring, or promotion. 42 U.S.C. 2000e-5(g)(2)(B). Congress did not add similar language to the ADEA in the Civil Rights Act of 1991. For the reasons discussed below, see p. 22, *infra*, the significance of that difference was greatly exaggerated by the Eighth Circuit below.

Justice White, concurring in the judgment in *Price Waterhouse*, would have held that a mixed-motive case is governed by *Mt. Healthy*, and would have "shifted the burden to the employer only when a plaintiff 'show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) (brackets in original)); see *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) (initial burden on plaintiff to show protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision") (quoting *Mt. Healthy*, 429 U.S. at 287). Justice White did not state that direct evidence would be required, and *Mt. Healthy*, on which he relied, does not impose such a requirement. See p. 18, *supra*.

Finally, Justice O'Connor would have required that a plaintiff in a mixed-motive case "show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision" before shifting the burden to the employer to show it would have made the same decision absent discrimination. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in the judgment) (emphasis added).

2. In this case, the court of appeals held that Justice O'Connor's concurring opinion was the controlling opinion in *Price Waterhouse*, see Pet. App. 5a, and that it remained controlling with respect to the ADEA even after this Court's decision in *Desert Palace*. See *id.* at 8a, 11a ("Even if some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse*, the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable."). This Court in *Desert Palace* saw "no need to address which of the opinions in *Price Waterhouse* is controlling" because a direct evidence requirement was "inconsistent

with the text of § 2000e-2(m)." *Desert Palace*, 539 U.S. at 98.[5] Likewise, the Court need not untangle the various opinions in *Price Waterhouse* to resolve the issue presented in this case. Even assuming Justice O'Connor's separate opinion was controlling in *Price Waterhouse* in construing Title VII, that conclusion would not support the adoption of a novel direct evidence requirement under the ADEA. This Court's *subsequent* and *unanimous* decision in *Desert Palace* embraced an analysis that weighs heavily against adoption of a direct evidence requirement under a discrimination statute absent a statutory directive. Now that the issue is squarely before the Court under the ADEA, this Court should reject the imposition of a direct evidence requirement for the reasons set forth in *Desert Palace*.

Nor is a direct evidence requirement supported by the fact that Congress amended Title VII in 1991 without also correspondingly amending the ADEA. See Pet. App. 8a-11a (suggesting that Congress ratified a direct evidence

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[5] In *Desert Palace*, the United States argued that *Price Waterhouse* imposed a direct evidence requirement and that such a requirement survived the 1991 amendments to Title VII that added 42 U.S.C. 2000e-2(m). U.S. Amicus Brief at 11-24, *Desert Palace*, *supra* (No. 02-679). Similarly, the EEOC in its Compliance Manual interpreting the 1991 amendments assumed that direct evidence was required in a mixed-motive case under Title VII. *EEOC Compliance Manual* § 604, at 604:0141 (Sept. 2002) (Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)). The EEOC recently revised that Guidance in light of *Desert Palace* to provide that "[t]he 1992 Enforcement Guidance's statements about the need for direct evidence in mixed-motive cases are contrary to [*Desert Palace*]," and therefore "[t]hose statements * * * are no longer in effect." *Effect of* Desert Palace, Inc. *v.* Costa, *539 U.S. 90 (2003), on Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)*, EEOC Directives Transmittal No. 915.002 (Jan. 16, 2009) <http://www.eeoc.gov/policy/docs/disparat.html>.

requirement under the ADEA when it amended Title VII in 1991 without amending the ADEA); cf. p. 21 n.4, *supra*. As an initial matter, the pertinent 1991 amendment "does not mention" direct evidence (*Desert Palace*, 539 U.S. at 98-99)—much less indicate that Congress meant to approve a direct evidence rule for discrimination cases generally and simply carved out an exception only for Title VII. The 1991 amendment to Title VII therefore in no way implies that Congress intended that circumstantial evidence would be insufficient under the ADEA. Moreover, after *Price Waterhouse*, the circuits were divided on the question whether Justice O'Connor's opinion in *Price Waterhouse* was controlling. See *Desert Palace*, 539 U.S. at 95 (noting conflict in the circuits); *e.g.*, *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.) ("'[D]irect evidence' was *not* a requirement imposed by the majority in *Price Waterhouse*."), cert. denied, 506 U.S. 826 (1992). Accordingly, when Congress amended Title VII in 1991, there was no settled direct evidence requirement under *Price Waterhouse* that Congress could be regarded as having ratified for application under the ADEA. See *Jama* v. *ICE*, 543 U.S. 335, 350-351 (2005); *Grogan* v. *Garner*, 498 U.S. 279, 290 (1991).

In all events, it is far more likely that Congress intended the ADEA (as well as other discrimination statutes) to be construed consistent with (1) the long-settled and "deep rooted" treatment of circumstantial evidence as on par with direct evidence (*Desert Palace*, 539 U.S. at 100); (2) this Court's repeated recognition that circumstantial evidence may be used to show discrimination; and (3) the applicability of the general rules of civil litigation to discrimination statutes, including the ADEA. In short, Justice O'Connor's separate opinion in *Price Waterhouse*, in which no other

Justice joined, is simply too thin a reed on which to erect an anomalous direct evidence requirement under the ADEA.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings consistent with the views set forth in this brief.

Respectfully submitted.

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FEBRUARY 2009